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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION,

Petitioner,

v.

SHERMAN J. OLIVIER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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v.

SHERMAN J. OLIVIER,

Respondent.

APPEARANCE OF COUNSEL

The clerk is requested to enter my appearance as counsel for South Carolina Property and Casualty Insurance Guaranty Association ("SCIGA") who in this Court is Petitioner. I certify that I am a member of the bar of the Supreme Court of the United States.

By: _____
GREGORY C. BUFFALOW
Counsel of Record for South Carolina Property and Casualty Insurance Guaranty Association

QUESTIONS PRESENTED FOR REVIEW

1. Whether the finding of personal jurisdiction under the facts of this case is contrary to the Due Process requirement from the Fourteenth Amendment that a defendant must have minimum contacts with and purposefully avail himself of doing business in the forum in order for a federal district court to exercise personal jurisdiction? The Court is asked to review the finding of quasi in rem jurisdiction (erroneously characterized as personal jurisdiction) since Petitioner SCIGA has transacted no business in the state of Alabama, has maintained no offices in the state of Alabama, and has held no interest in property in the state of Alabama, and has employed no agents or employees whatsoever in the state of Alabama.

2. Whether a federal court may constitutionally require a state insurance guaranty association to submit to personal

jurisdiction in another state, where there has been no consent to be sued outside of the state of creation? The Court of Appeals would have all such state guaranty associations consent to jurisdiction in all states by virtue of having statutorily assumed certain limited obligations or covered claims of insolvent insurers, for the benefit of resident insureds. It is submitted that the statutes do not consent to jurisdiction outside of the state of creation, and for the Eleventh Circuit to hold otherwise, based on a legal fiction, thus raises the question whether the court below has failed to give full faith and credit or proper deference to the limited grant of jurisdiction from the affected states and, in so doing, has acted contrary to the provisions of the Tenth and Fourteenth Amendments.

3. Whether a state may constitutionally exercise quasi in rem jurisdiction over a garnishee, unincorporated state insurance

guaranty association, created by statute, where the creating state has not consented for its guarantor to be sued out of state?

4. Whether a federal district court applying state garnishment law following trial of a Jones Act suit, may constitutionally exercise quasi in rem jurisdiction, as a substitute for personal jurisdiction, based on a legal fiction that a non-resident state insurance guaranty association is deemed the insurer, where the association has no forum contacts, by attaching the limited statutory obligations of the out-of-state association?

5. Whether a finding of jurisdiction against an out-of-state non-profit, unincorporated state insurance guaranty association is to be as easily imposed as against an out-of-state-for-profit insurer, and thus, whether the decision of the Court of Appeals below is inconsistent with the result in Rush v. Savchuk, 444 U.S. 320, 62 L.Ed.2d

516, 100 S. Ct. 571 (1980)?

6. Whether the quasi in rem garnishment procedure was erroneously applied as the equivalent of personal jurisdiction, where the garnishee had no presence in the forum, and apart from a legal fiction, there was no res in the district that could be attached?

7. Whether the need for uniformity on the issues presented, and differing results in various jurisdictions including two Courts of Appeal, require the grant of certiorari?

LIST OF THE PARTIES

South Carolina Property and Casualty Insurance Guaranty Association, Petitioner and Garnishee below.

Sherman J. Olivier, Respondent and Plaintiff below.

Louisiana insurance Guaranty Association, Garnishee below.

Alabama Insurance Guaranty Association, Garnishee below.

There are no parent companies or subsidiaries of the foregoing parties. Alabama Insurance Guaranty Association is not involved in the appeal. All parties to the appeal have previously filed Certificates of Interested Parties and Corporate Disclosure Statements in the Eleventh Circuit which remain correct.

There are two other parties in interest no longer active in the case, the insolvent employer Merritt Dredging Company, Inc. and Merritt's insolvent insurer, Midland Insurance

Company. Petitioner believes Merritt and Midland have no interest in the outcome of the petition.

TABLE OF CONTENTS

Page

Appearance..... i

Questions Presented for Review..... 1

List of the Parties..... 5

Table of Contents..... 7

Table of Authorities..... 9

Citations to Opinions Below..... 12

Statement of the Grounds for Jurisdiction..... 13

Existence of Jurisdiction Below..... 14

Constitutional Provisions Involved..... 16

Statement of the Case..... 17

Argument and Citation of Authorities..... 29

Introduction..... 29

I. SCIGA'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED BY A FINDING OF JURISDICTION BY THIS COURT..... 31

A. SCIGA has not purposefully directed any activities towards the State of Alabama and does not have the minimum contacts necessary to satisfy the Due Process clause of the Fourteenth Amendment to the Constitution..... 31

B. The reasoning of McGee v. International Life Insurance Co. as applied to a commercial primary insurer should not be applied as to a state-created unincorporated guaranty association with statutorially imposed limited guaranty obligations designed to protect the residents of South Carolina..... 36

C. Personal jurisdiction should not be imposed upon SCIGA simply because of the foreseeability that a claim may arise in a given jurisdiction..... 41

D. The Legislation creating SCIGA does not indicate any intention to be sued outside of the State of South Carolina and SCIGA has not consented to the imposition of jurisdiction by a foreign forum..... 43

II. THE DECISION IN THE ELEVENTH CIRCUIT BELOW IS CONTRARY TO THE MOST RECENT DECISION OF THIS COURT ON THE EXTENT OF QUASI IN REM JURISDICTION..... 48

III. THE DECISION OF THE ELEVENTH CIRCUIT BELOW IS CONTRARY TO TRADITIONAL NOTIONS OF RESERVED POWERS OF THE STATES AND THE FULL FAITH AND CREDIT CLAUSE..... 50

IV. THE EFFECT OF THE ELEVENTH CIRCUIT DECISION WOULD BE SEVERE ON ALL STATE GUARANTY ASSOCIATIONS..... 52

Conclusion..... 54

Certificate of Service..... 55

TABLE OF AUTHORITIES

CASES — Page

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987)..... 36

Backhus v. Transit Casualty Co., 1990 A.M.C. 417 (La. 1989)..... 28

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)..... passim

Georgia Insurers Insolvency Pool v. Brewer, 583 So.2d 377 (Fla. Dist. Ct. App. 1991)..... 14,16,30

Hanson v. Denkla, 357 U.S. 235 reh'g denied, 358 U.S. 858 (1958)..... 37

International Shoe Co. v. Washington, 326 U.S. 310 (1945))..... 35,44

McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 223 (1957)..... passim

Olivier v. Merritt Dredging Company, Inc., 954 F.2d 1553 (11th Cir. 1992)..... passim

Rhulen Agency, Inc. v. Alabama Ins. Guar. Assoc., 715 F.Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2d Cir. 1990)..... passim

Rush v. Savchuk, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980)..... 5,51

Shaffer v. Heitner, 433 U.S. 186 (1977)..... 35

South Carolina Ins. Guar. Assoc. v. Underwood, 527 So.2d 931 (Fla. Dist. Ct. App. 1988)..... passim

World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286 (1980)..... 44

CONSTITUTIONAL PROVISIONS

United States Constitution, Article IV, Sec. 1..... 18,33

United States Constitution Amendment X..... 53

United States Constitution Amendment XIV, Sec. 1..... 18

STATUTES AND RULES

Ala. Code §6-6-390 (1975)..... 16,18

Ala. R. Civ. P., Rule 4.2(a)..... 18

S.C. Code Ann. 38-31-20(3) (1988)..... 18,26,32

S.C. Code Ann. 38-31-30..... 18,26

S.C. Code Ann. 38-31-40..... 18

S.C. Code Ann. 38-31-60(a)..... passim

S.C. Code Ann. 38-31-60(b)..... 18,32

S.C. Code Ann. 38-31-60(c)..... 18,43

S.C. Code Ann. 38-31-100(2)..... passim

Supreme Court Rule 10..... 15

Supreme Court Rule 13.4..... 15

28 U.S.C. §1254(i)..... 15

28 U.S.C. §1291..... 17,19

46 U.S.C. §688..... 19

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions are officially reported at Olivier v. Merritt Dredging Company, Inc., 954 F.2d 1553 (11th Cir. 1992) and set out at Appendix A. The opinion of the District Court is not reported and is set out at Appendix B.

STATEMENT OF THE GROUNDS FOR JURISDICTION

In reversing the district court finding that there was no personal jurisdiction, the Eleventh Circuit concluded that application of the Alabama Long-Arm Statute in a garnishment proceeding was permissible under the Due Process clause of the Fourteenth Amendment.

The date of the decision from the Eleventh Circuit sought to be reviewed is March 6, 1992. A suggestion of rehearing en banc was filed by Petitioner on or about March 26, 1992, which remains pending. Supreme Court Rule 13.4 provides that a suggestion of rehearing en banc does not extend the time for filing a petition for writ of certiorari. This petition is therefore timely filed within 90 days of the decision from the Eleventh Circuit.

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1) and Supreme Court Rule 10. It is submitted that jurisdiction is proper since the decision of the Eleventh Circuit has

decided important questions of law in which the need for uniformity is great.

The Supreme Court should take jurisdiction since the decision from the Eleventh Circuit was inconsistent with the result reached in a previous decision from the Second Circuit, Rhulen Agency, Inc. v. Alabama Ins. Guar. Assoc., 715 F.Supp. 94 (S.D.N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2d Cir. 1990)(jurisdiction denied), and a previous Florida decision, South Carolina Ins. Guar. Assoc. v. Underwood, 527 So.2d 931 (Fla. Dist. Ct. App. 1988)(jurisdiction denied). But see Georgia Insurers Insolvency Pool v. Brewer, 583 So.2d 377 (Fla. Dist. Ct. App. 1991)(jurisdiction upheld).

EXISTENCE OF JURISDICTION BELOW

Jurisdiction for garnishment in the district court was based on Ala. Code § 6-6-390 (1975), following a jury trial of a Jones Act

claim. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291. There has been no determination of subject matter jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. IV, Sec. 1; Amend. X and Amendment XIV, Sec. 1, all as set forth in the Appendix.

STATUTORY PROVISIONS INVOLVED

Alabama Long-Arm Statute, Rule 4.2(a), Ala.R.Civ.P.; Alabama garnishment statute, Ala. Code § 6-6-390 (1975); and various statutes creating South Carolina Property and Casualty Insurance Guaranty Association, S.C. Code Ann. §§38-31-20(3), 38-31-30, 38-31-40, 38-31-60(a), 38-31-60(b), 38-31-60(c), and 38-31-100(2) (1988), all as set forth in the Appendix.

STATEMENT OF THE CASE

The basis of jurisdiction in the court of first instance was the Jones Act, 46 U.S.C. §688, and in the Eleventh Circuit, 28 U.S.C. §1291.

This petition presents the question whether a State may constitutionally exercise personal jurisdiction over a defendant unincorporated insurance guaranty association which has no officers, agents or employees, or real or personal property in the forum state. The sole jurisdictional contact for a due process analysis is the legal fiction that a guaranty association may be "found" since the association is deemed the insurer for a covered claim. It is submitted the Eleventh Circuit erroneously found personal jurisdiction, reversing the district court, by treating the quasi in rem attachment procedure under Alabama law as the functional equivalent to a direct action against the unincorporated insurance

guaranty association who has no presence in the forum.

The underlying judgment which is the basis of the subject claims against the South Carolina and Louisiana insurance guaranty associations was entered on February 14, 1989. At that time, Plaintiff Sherman J. Olivier, a Louisiana resident, obtained a judgment in Alabama in the amount of $522,190.00 against his South Carolina employer, Merritt Dredging Company, Inc. The jury award was based on the Jones Act and general maritime law for alleged personal injuries sustained on or about August 1, 1983 while Olivier was employed by Merritt as a seaman and member of the crew of a vessel.

Merritt had previously filed a bankruptcy petition pursuant to Chapter 11 of the United States bankruptcy laws and Merritt's insurer, Midland Insurance Company, had been placed in liquidation pursuant to an order entered by the Supreme Court of New York. Due to the

insolvency of both Merritt and its insurer Midland, Olivier sought writs of garnishment under Alabama law against the Alabama, South Carolina and Louisiana Insurance Guaranty Associations. On July 21, 1989, the district court issued the writ of garnishment by which Plaintiff sought recovery for the remaining amount of the judgment which had not been satisfied by excess underwriters, the principal amount of $469,645.98, plus interest and costs.

The writ against Alabama Insurance Guaranty Association is not involved in this appeal. The Louisiana and South Carolina Insurance Guaranty Associations, successfully requested dismissal in the district court on the grounds that the court lacked personal jurisdiction and that the garnishment procedure was improper to obtain personal jurisdiction.

The district court dismissed claims against SCIGA and the Louisiana Insurnace Guaranty Association ("LIGA") by order dated December

21, 1990 (App. B). As noted above, this decision was based on a factual determination that the garnishees "cannot be said to have purposefully availed themselves of the privilege of conducting business in this state . . . ." As noted, the Alabama Association is not involved in this appeal since it was clearly subject to suit in Alabama.

On January 18, 1991, Olivier filed a timely notice of appeal to the Eleventh Circuit. On March 6, 1992, the Eleventh Circuit reversed a finding that there was personal jurisdiction over the guaranty associations in the district court.

> We hold that the acts of guaranteeing insurance obligations within the state and of assuming the role of insurer are of such a nature that they justify the legal fiction that LIGA and SCIGA have consented to service of process and suit in Alabama.

954 F.2d at 1558. The decision further stated that, "by serving as guarantors of Midland's obligation to Olivier, LIGA and SCIGA

purposefully availed themselves of conducting activities within Alabama. Id.

The decision also contained a lengthy dissent by Senior Judge Frank M. Johnson who recognized that the provisions of the state statutes creating the guaranty associations "indicate a desire on the part of LIGA and SCIGA to be sued only in their own fora" so that these guaranty associations lack the requisite minimum contacts with Alabama. 954 F.2d at 1562. The dissent also argued that "the majority's minimum contacts analysis reflects an undue focus on foreseeability." Id. at 1560. The dissent further recognized that the guaranty associations' acts in guaranteeing insurance obligations was limited, in large extent, because there was not a wholesale adoption of all relevant policy terms. Thus, the dissent reasoned, the exposure of the guaranty associations was

clearly distinguishable from that of a private guarantor. Id. at 1561.

On March 26, 1992, the Louisiana and South Carolina Insurance Guaranty Associations filed a suggestion of rehearing en banc which remains pending before the Eleventh Circuit. Since no decision on the suggestion for rehearing en banc was made within 90 days after the entry of judgment, a timely petition for writ of certiorari was filed herein on June 4, 1992.

The factual record regarding jurisdictional contacts with Alabama is remarkably brief. The evidence consists solely of the applicable statutes creating the insurance guaranty associations, documentation of insurance coverage by Midland Insurance Company, issued to Merritt Dredging Company on or about April 1, 1983, and affidavits filed on behalf of LIGA and SCIGA which denied that either association had assets, property or employees within the state of Alabama, and further denied that

either of the associations is licensed to do business in the state of Alabama or has transacted any business in the state of Alabama.

The Midland policy is entitled "Workmen's Comp" and bears a handwritten caption "Maritime." It also has a typewritten addition to the cover page "Offshore," and contains a second page bearing captions "Workmen's Compensation," and "Amendments to Coverage B Endorsement--Maritime (Masters or Members of the Crew of Vessels) (Including Transportation, Wages, Maintenance and Cure)."

Petitioner SCIGA is wholly a creature of statute. As the dissenting opinion in the circuit court below observed, there is nothing in the statutory authority enacted by the South Carolina legislature to indicate that the State of South Carolina consented for its Guaranty Association to be sued outside the state of South Carolina. Instead, as the dissent noted, the provisions of the creating statutes suggest

otherwise, particularly the provisions governing priority where more than one state insurance guaranty association may be involved.

> Rather than purposeful availment, the priority provisions indicate a desire on the part of LIGA and SCIGA to be sued only in their own fora.

954 F.2d at 1562. The Guaranty Association statutes provide a limited guaranty of obligations of insolvent insurers only to the extent of a "covered claim." See, for example, S.C. Code Ann. § 38-31-20(3). There are numerous exclusions, however, and SCIGA is not responsible, e.g., for covered claims arising more than 30 days after the determination of insolvency. S.C. Code Ann. § 38-31-60(a)(i). Neither is the association liable for coverage involving ocean marine insurance. S.C. Code Ann. § 38-31-30. The statutes empower the association to "pay the full amount of any covered worker's compensation claim," but limit other obligations to $300,000.00. S.C. Code

Ann. § 38-31-60(a). Given these limitations, and the expressed preference for the interests of residents, S.C. Code Ann. §38-31-100(2), certainly the extent of the statutory guaranty is less than that of the commercial contractual guarantor in McGee v. International Life Ins. Co., 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed.2d 223 (1957) relied on by the majority in the Eleventh Circuit below. Although the decision of the Eleventh Circuit assumed, for purposes of deciding jurisdiction, that the case involved a "covered claim," it has never been established by the trier of fact whether the parties intended the policy to be worker's compensation, employer's liability, ocean marine, P&I coverage or otherwise, or whether various statutory exclusions from coverage apply. Should the caption of the policy be controlling, i.e., so that this is a worker's compensation claim, significantly, the forum selection provisions of the statute would

require Olivier, a Louisiana resident, to "seek recovery first from the association of the residence of the claimant," S.C. Code Ann. § 38-31-100(2). If coverage for Olivier's Jones Act claim is deemed P&I type coverage, at least one court has held that P&I coverage for a Jones Act claim involves a type of "ocean marine insurance" which is excluded from coverage of guaranty acts. Backhus v. Transit Casualty Co., 1990 A.M.C. 417, 419 (La. 1989).

The actions of the Eleventh Circuit in finding jurisdiction, however, by relating the status of non-profit unincorporated insurance guaranty associations to that of commercial guarantors as in McGee, supra, would have drastic consequences in all 50 states, the District of Columbia, Puerto Rico and the U. S. Virgin Islands, which have property and liability insurance guaranty associations.

Since virtually every major insurance company in the United States issues policies

either to individuals in every state, or extends coverage to almost every state, then every state insurance guaranty association would be subject to suit in all 50 states. Thus any out of state guaranty association, designed to protect the residents of the state in which they are created, would be subjected to jurisdiction in foreign fora based on a legal fiction that the associations are "deemed the insurers" to the extent of an obligation on a "covered claim."

The issues in this petition are of first impression in the Eleventh Circuit and they are believed to be of first impression as to any United States court of appeal. See Olivier, supra, 954 F.2d at 1560 (dissent). The jurisdictional issue presented was addressed in Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n., 715 F.Supp. 94 (S.D. N.Y. 1989), aff'd on other grounds, 896 F.2d 674 (2d cir. 1990), reaching the opposite result from the Eleventh

Circuit herein, but the majority in the Eleventh Circuit below dismissed consideration of the contrary result from the district court herein and in Rhulen, since the Second Circuit had affirmed Rhulen based on a lack of subject matter jurisdiction without fully considering personal jurisdiction.

Thus, because there are differing results below, and since uniformity is desirable, the petition for writ of certiorari should be granted.

ARGUMENT AND CITATION OF AUTHORITIES

INTRODUCTION

The issues involved in this appeal present this Court with fundamental questions of exceptional importance which will not only affect the parties to this case, but all 50 state guaranty associations. Pursuant to the Post-Assessment Property and Liability Insurance Guaranty Associations Model Act, each state has, as a matter of legislative action, created a source of funds to aid its residents in the event they are faced with an insurance claim not covered due to the insolvency of an insurer. The issues presented in this action primarily concern whether out-of-state guaranty associations that are wholly creatures of statute, and are unincorporated nonprofit entities designed to protect the residents of the states in which they are created, may be subjected to personal jurisdiction in foreign fora without violating the Due Process Clause

of the Fourteenth Amendment to the Constitution.

The Appellate Court's opinion has effectively legislated that jurisdiction in any state may be obtained over out-of-state guaranty associations because the relatively uniform state statutes which have created them have provided that these associations are "deemed the insurers" to the extent of an association's obligation on a "covered claim," as defined by statute. See, S.C. Code Ann. §38-31-60(b) and §38-31-20(3). As a result, the Eleventh Circuit has opined that these associations have assumed insurance obligations in every state to a degree that is sufficient to invoke jurisdiction and not offend Due Process rights.

Since the issues are believed to be of first impression, and since the resolution of the conflicting decisions in Rhulen, Underwood and Brewer, supra, will effect state guaranty

associations nationwide, SCIGA has respectfully filed this Petition for Writ of Certiorari.

I.

SCIGA'S DUE PROCESS RIGHTS HAVE BEEN VIOLATED BY A FINDING OF JURISDICTION BY THIS COURT

A. SCIGA has not purposefully directed any activities towards the State of Alabama and does not have the minimum contacts necessary to satisfy the Due Process clause of the Fourteenth Amendment to the Constitution.

The Appellate Court's opinion effectively holds that by creating a statutory guarantee of insurance claims for its state's residents, each state's guaranty association has consented to suit in any jurisdiction where an insurance claim arises. Under the Appellate Court's reasoning, such personal jurisdiction is established even though the guaranty association itself has had no contact with the forum state, for the act of the statutorily imposed guarantee itself would constitute

"insurance obligations" in all states, which under the rationale in McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957), would allow jurisdiction even though no other business has been conducted in the forum state.

The Supreme Court of the United States has held that the Due Process Clause prohibits a defendant from being haled into court in a foreign state as a result of fortuitous or attenuated contacts or as a result of the unilateral activity of a third person. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The Supreme Court has repeatedly held that one of the fundamental tests necessary to determine whether a defendant's liberty interest under the Due Process Clause has been violated by subjecting the defendant to the jurisdiction of a foreign forum is to examine whether the

defendant has established meaningful contacts, ties or relations with the foreign forum.

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'

Burger King Corp., supra, at 471-72 (quoting International Shoe Co. v. Washington, 326 U.S. 310 (1945)). The Supreme Court has determined that "all assertions of state-court jurisdiction must be evaluated according to the standard set forth in International Shoe and its progeny." Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The progeny of International Shoe establish that the Constitution does not allow a state to exercise jurisdiction over a non-resident defendant unless that defendant "purposely avails" itself of the privilege of acting in the state by "deliberately" engaging in conduct there or by creating "continuing obligations" to residents of the state, so that

there can be said to be a "substantial connection" between the defendant and the forum. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-76 (1985). "The 'substantial connection' . . . must come about by an action of the defendant purposefully directed toward the forum state." Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987).

As pointed out in the dissenting opinion by Judge Johnson, the majority below has decided that SCIGA has established contacts, ties or relations sufficient to establish jurisdiction merely by virtue of the mere fiction of having guaranteed insurance obligations within the State of Alabama, and by assuming the role of insurer as to the claim asserted by Olivier. The Eleventh Circuit did not identify any "deliberate" act or any "purposeful availment" by SCIGA directed towards the state of Alabama.

The finding of contacts by virtue of SCIGA's limited guaranty of insurance

obligations within Alabama is in error and SCIGA's Due Process rights would be violated by Alabama's exercise of jurisdiction. The South Carolina Act does not guarantee insurance obligations in Alabama. The Act focuses only on the State of South Carolina and guarantees claims relating only to South Carolina insureds, claimants or property. Guaranty associations in every state have similar statutes in order to protect the residents of their respective states.

The only connection involving the State of Alabama is that the injury occurred in Alabama. Such fortuitous circumstances are not sufficient to invoke jurisdiction, as stated by this Court in Hanson v. Denkla, 357 U.S. 235, 253, reh'g denied, 358 U.S. 858 (1958):

> the unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . It is essential in each case that there be some act by which the defendant purposefully

> avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

This principle is designed to protect a defendant from being haled into a jurisdiction as a result of "random, fortuitous, or attenuated contacts." Burger King, supra, 471 U.S. at 475.

B. The reasoning of McGee v. International Life Insurance Co. as applied to a commercial primary insurer should not be applied as to a state-created unincorporated guaranty association with statutorially imposed limited guaranty obligations designed to protect the residents of South Carolina.

It is clear from the record below that SCIGA does not transact any business in Alabama, has no office or service agent in Alabama, and has no contacts with the State of Alabama whatsoever. In spite of SCIGA's clear lack of minimum contacts with the State of Alabama, however, the Eleventh Circuit has held that assumption of insurance obligations in a state may result in jurisdiction because of the

reasoning of McGee v. International Life Insurance Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). Clearly, McGee is distinguishable since it involved a commercial insurer who did indeed have a presence in the forum, and since it issued a policy of reinsurance and corresponded with the insured, directly, by mail in order to collect premiums. In contrast here, SCIGA had no presence in Alabama, no property or employees, collected no assessments, and had no direct dealings or privity with the insured as did the reinsurer in McGee.

The sole contact between SCIGA and the forum was its limited statutory obligation on a potentially covered claim and the legal fiction that it could be deemed the insurer. As noted by Judge Johnson in his dissent, however, "[t]hese statutory provisions relate only to substantive insurance obligations." 754 F.2d at 1560. SCIGA has in no way assumed all of

the obligations under the policy. The statute itself imposes restrictions on what claims are to be covered. For example, Section 38-31-60(a) of the Act states that an obligation under most claims is limited to $300,000.00 or less. In addition, only certain types of insurance claims are covered. Life insurance, title insurance, surety insurance, accident and health insurance, mortgage guaranty insurance and ocean marine insurance are not covered by the Act. Thus, simply because a primary insolvent insurer has issued a policy covering a certain risk, SCIGA is not necessarily obligated for payment of the claim associated with such risk. Furthermore, even if a claim is covered, the obligation of the Guaranty Association is reduced by the amount of recovery received from another guaranty association who may also be responsible under the claim. S. C. Code Ann. § 38-31-100(2). Thus, SCIGA's obligation of insurance can

certainly not be compared to that of a primary insurer or the commercial reinsurer in McGee (who was in privity with the insured) as it is, or may be, limited by a number of factors.

Moreover, the limited obligations of the Association that have been assumed from the primary insurer are assumed by statute, not by contract. Unlike a commercial guarantor, SCIGA received no consideration for the act of guarantee, and the Association had no ability to assess the risks associated with the primary insurer's various policies of insurance. The McGee case so heavily relied on by the Eleventh Circuit, by contrast, involved a primary insurer who, unlike SCIGA, not only was able to assess the risks associated with assuming a policy covering California risks, but also derived economic benefit by doing so. The insurer in the McGee case contractually assumed risks in the foreign state for the purpose of making a profit, thereby deriving a direct

benefit from a resident of that state. In assuming the policy, the insurer in the McGee case even sent personal notice of reinsurance to the insured in the foreign state, and received direct payment of premiums from the insured. McGee, supra, 2 L.Ed.2d at 225. It would certainly be reasonable to conclude that the insurer in McGee thus "purposefully directed" activities towards the forum state of California in its contractual assumption of the policy and its continued solicitation of business directly from the insured.

SCIGA, on the other hand, has derived no benefits whatsoever from the State of Alabama. Although it was argued that SCIGA is funded by a portion of the premiums that were written by Midland Insurance Company, this is not necessarily true. The South Carolina Act requires that member insurers pay obligations and expenses incurred by the Association based

on the portion of premiums written in South Carolina only when assessed. See, S. C. Code Ann. § 38-31-60(c). There is no "fund" per se set up by the Association and there could be no assessment from Midland for this claim since any such assessments would come after the fact. When the Association pays a claim, an assessment of its member insurers is made. Midland Insurance Company has been in bankruptcy for a number of years, and Olivier has never made a showing that Midland Insurance Company actually was assessed to pay this claim during any time period relevant to this case.

C. Personal jurisdiction should not be imposed upon SCIGA simply because of the foreseeability that a claim may arise in a given jurisdiction.

In reality, SCIGA has no contacts whatsoever with the State of Alabama other than the mere possibility of foreseeability of suit arising in foreign fora. "'Foreseeability' alone has never been a sufficient benchmark for

personal jurisdiction under the Due Process Clause." World-Wide Volkswagen Corporation v. Woodson, 444 U.S. 286, 295 (1980). Thus, if the reasoning of the Eleventh Circuit majority is allowed to stand, it would set forth the principle of law that a non-profit state guarantor may be subject to suit in any state to which the insured fortuitously travels. Such a result is completely repugnant to the reasoning set forth in International Shoe and its progeny.

The finding of jurisdiction under the facts of this case is thus contrary to this Court's requirement that a defendant must purposefully avail itself of conducting activities within the foreign state. How can it possibly be said that SCIGA has "purposefully directed" activities towards the State of Alabama by having assumed limited insurance obligations of a primary insurer, when the Association is a nonprofit statutorily created entity which

enters into no contracts of insurance or guaranty in any state whatsoever? There is an obvious distinction between a contractual guaranty involving the ability to choose where to assume obligations directly with the insured, as in the McGee case, and a statutory obligation with no privity with the insured, as is involved here.

D. The Legislation creating SCIGA does not indicate any intention to be sued outside of the State of South Carolina and SCIGA has not consented to the imposition of jurisdiction by a foreign forum.

Not only has SCIGA not deliberately directed any activities toward the state of Alabama nor purposefully availed itself of the privilege of conducting business in Alabama, but SCIGA also has not in any way consented to personal jurisdiction within the State of Alabama. The Court below points to no authority by which SCIGA has consented to be sued in Alabama, and no such authority or legislative consent exists.

The South Carolina statute was intended to benefit residents and insureds of South Carolina, and it is clear that the South Carolina Act, as well as other state guaranty association acts, have intended their own state's administrative and legal system to be the operative means by which these insurance claims are brought. Indeed, the only way to properly determine otherwise would be to certify the question to the Supreme Court of South Carolina (as the Appellate Court below refused to do).

The South Carolina statute provides certain priority provisions which are designed to prevent double recovery in the event more than one guaranty association may be responsible on a given claim. S. C. Code Ann. § 38-31-100(2). A close reading of these provisions shows that recovery in the context of a workmen's compensation claim, for example, must be sought first from the association of

residence of the claimant. Thus, the statute clearly dictates that recovery must first be had in another jurisdiction before coming to South Carolina, particularly if the "Workmen's Comp." caption on the Midland policy is controlling. These priority provisions indicate that the South Carolina Legislature intended SCIGA to be sued in its own forum. But the Appellate Court, having ruled that jurisdiction over SCIGA may be obtained in virtually any state, has effectively removed important determinations of this nature from the South Carolina legislature or legal system.

Moreover, determinations must be made as to whether a claim is covered, the extent of the covered claim, whether a claim has been brought timely under the provisions of the South Carolina Act, whether another guaranty association is partially responsible for the claim, and numerous other procedural and

substantive issues. It is interesting to note that the Court below in deciding the personal jurisdiction question has apparently made its own determination as to whether Olivier's Jones Act suit is in fact a "covered claim" within the scope of the South Carolina Act. There has been no decision on that question by the trial court, and it is SCIGA's position that such a claim is not a "covered claim" as it may be within the ocean marine exclusion provisions of the South Carolina Act. These determinations made by other courts indicate some of the problems associated with removing these types of substantive issues from the province of SCIGA and the South Carolina courts. As a result of the Appellate Court's holding, a court sitting in Alabama could determine whether or not Olivier's claim is covered under the South Carolina Act, who has priority as between LIGA and SCIGA, and whether SCIGA

assets may be garnished. These matters should rest with the Guaranty Association and the courts of the state that created it. Likewise, the South Carolina Act, like other state insurance guaranty acts, requires the Commissioner of Insurance to review actions of the Association. This mechanism will be disrupted by the Eleventh Circuit holding in this case.

The court below has erred in determining that assumption of insurance obligations in a state, without a jurisdictional presence, will have the effect of submitting to jurisdiction. It may be reasonable to say that a commercial insurer, who may assess risks, knowingly evaluate what areas in which it wishes to operate, and adjust its premiums accordingly to compensate for the risks associated with a given state, may be subject to suit in a state in which a risk happens to materialize--particularly if it collects

premiums and engages in business there. When applied to a nonprofit unincorporated association like SCIGA and other state guaranty associations, however, this analysis is inappropriate and should be rejected. Nothing in the South Carolina Guaranty Act indicates that the South Carolina legislature intended that SCIGA, in assuming the limited financial obligations of the primary insurer, would also be subject to suit wherever the primary insurer might be found. No waiver of SCIGA's due process rights can reasonably be inferred from SCIGA's statutory financial obligations.

II.

THE DECISION IN THE ELEVENTH CIRCUIT BELOW IS CONTRARY TO THE MOST RECENT DECISION OF THIS COURT ON THE EXTENT OF QUASI IN REM JURISDICTION

Although the minimum contacts analysis is applied whether the case is in personam or, as here, quasi in rem, the law is clear that a fiction alone is insufficient to establish

jurisdiction. Thus, where a contractual obligation is attached as a garnishable res, it is still required that the garnishee must have engaged in purposeful or voluntary activity in the formum sufficient to justify jurisdiction. Rush v. Savchuk, 444 U.S. 320, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980). Thus, the Eleventh Circuit should be reversed since its decision is contrary to the most recent jurisdictional standards stated by this Court, particularly in Savchuk, and unless the Supreme Court applies a uniform rule whether insurance guaranty associations are subject to suit outside of state (uniformity is also presented in the nearly identical statutes
adopted by the associations interested in this suit, and the others, since most of these laws are based on the Insurance Guaranty Association Model Act, Olivier, supra, 954 F.2d at 1555 n.2.), the result in the Eleventh Circuit will wreak havoc on the insurance industry and, as

the dissent below observed, could well indeed jeopardize the existence of insurance guaranty associations by virtue of increased expenses of litigation in foreign fora.

> The social goal of aiding claimants and insureds of insolvent insurors will be disserved, and perhaps even defeated, by forcing the guaranty associations to expend a large share of their resources defending in foreign fora rather than actually satisfying covered claims.

Olivier, supra, 954 F.2d at 1563 (dissent).

III.

THE DECISION OF THE ELEVENTH CIRCUIT BELOW IS CONTRARY TO TRADITIONAL NOTIONS OF RESERVED POWERS OF THE STATES AND THE FULL FAITH AND CREDIT CLAUSE

For the Eleventh Circuit to disregard the South Carolina statutes which, nowhere, consent for SCIGA to be sued out of state, was an unconstitutional encroachment on the power reserved to the Legislature of the State of South Carolina. It is elementary constitutional law that there are attributes of

sovereignity attaching to every state which may not be impaired by the federal government by virtue of Amendment X. Thus, amenabilty to suit outside South Carolina may not be imposed by the federal government, absent consent from the South Carolina Legislature, since this is a matter reserved to the interested state. Amendment X specifically reserves powers of this nature unless specifically delegated by the U. S. Constitution or by the interested state.

The effect of the South Carolina statutes on its state-created insurance guaranty entity, as applied in an out-of-state forum, also involves concepts of comity or full faith and credit. Thus, the Eleventh Circuit below should also be reversed for failure to recognize and give effect to the provisions of the South Carolina statutes which "indicate a desire on the part of

. . . SCIGA to be sued only in their own fora." Olivier, supra, 954 F.2d at 1562 (dissent).

IV.

THE EFFECT OF THE ELEVENTH CIRCUIT DECISION WOULD BE SEVERE ON ALL STATE GUARANTY ASSOCIATIONS

The issues involved in this case are of importance to every state guaranty association. It is likely that all state guaranty associations have numerous insurers within their membership that issue policies insuring risks throughout the United States. Unless reversed, the Eleventh Circuit decision will require that any state guaranty association could be subject to suit in any jurisdiction in the United States simply because a given claim may have arisen in such jurisdiction. Such a finding of jurisdiction based on a fortuity -- the unilateral acts of a particular plaintiff -- and a legal fiction

that the guarantee is a res whch can be attached, is contrary to the Constitution and traditional interpretations of the Due Process Clause of the Fourteenth Amendment.

Subjecting SCIGA, or for that matter, any other guaranty association to unlimited fora would impose a result that cannot be said to have been fairly intended by any of the state legislatures involved. As stated by Judge Johnson in the dissent:

> The majority underestimates the scope and magnitude of the effect its holding will have on insurance guaranty associations. As non-profit creatures of statute designed to benefit in-state claimants and insureds, they will have to raise relatively substantial sums of money, in what may become a large number of cases, to hire attorneys in foreign jurisdictions and pay other costs of defense in foreign fora. The social goal of aiding claimants and insureds of insolvent insurers will be disserved, and perhaps even defeated, by forcing the guaranty associations to expend a large share of their resources defending in foreign fora rather than actually satisfying covered claims.

Olivier, supra, 954 F.2d at 1562-1563.

It is indeed constitutionally improper to remove claims asserted against these guaranty associations from the province of their creating state and such a result should not be sanctioned by this Court.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon counsel for all parties to this proceeding by mailing three copies of the same by United States Mail, first class postage prepaid, on this the 4th day of June, 1992 as follows:

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